IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 105 of 2004
with
Civil Application No. 8674 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KIKUBHAI PARSHOTTAMBHAI PATEL
Versus
BABUBHAI VALLABHBHAI PATEL

Appearance:
1. Second Appeal No. 105 of 2004
MR SURESH M SHAH for Appellants
MR JB PARDIWALA for Respondent No. 1
..... for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 16/12/2004

ORAL JUDGEMENT

1. Instant appeal filed under Section 100 of the

Code of Civil Procedure ('the Code' for short) is directed against the judgment and decree dated 23.9.2004 rendered in Regular Civil Appeal No.115 of 1997 by the learned Joint District Judge and 2nd Fast Track Court, Navsari by which the appeal filed by the respondent Nos.1 and 2 herein came to be allowed and thereby the judgment and decree dated 20.10.1997 rendered in Regular Civil Suit No.247 of 1991 by the learned 2nd Joint Civil Judge (J.D.)., Navsari dismissing the suit filed by respondent Nos.1 and 2 herein is set aside and thereby the suit filed by them is allowed by holding that the respondents have a right of easement by necessity.

2. Present appellants were defendant Nos.1 and 2 whereas present respondent Nos.1 and 2 were plaintiffs and respondent No.3 herein was defendant No.3 in the suit. Therefore, the parties are hereinafter referred to as 'the plaintiffs' and 'the defendants' for the sake of convenience.

3. Case of the plaintiffs' in brief as set out in the plaint is as under:

3.1 Naranbhai Bhulabhai Patel, an agriculturist, was a resident of village Nagdhara. Late Naranbhai had three sons named (i) Chibabhai, (ii) Odhavbhai and (iii) Vallabhbhai. Chibabhai passed away as a bachelor. Nathubhai, son of Odhavbhai Naranbhai is alive. The plaintiffs are sons of Vallabhbhai Naranbhai. Defendant Nos.1 and 2 are real brothers and defendant No.1 is settled in England whereas defendant No.2 is residing at village Nagdhara. Defendant No.3 is the heir of late Naranbhai Mithalbhai. The land bearing Block No.276 at village Nagdhara is running in the name of Dudhiben, wife of Naranbhai Mithalbhai and mother of defendant No.3. Block No.276 was sold to defendant No.1 and land bearing Block No.276 is being administered and managed by defendant Nos.1 and 2.

3.2. As soon as defendant Nos.1 and 2 bought the land from Nathubhai, son of Odhavbhai Naranbhai Patel as described in para No.3 of the plaint, the defendants' started restraining the plaintiffs from using the right of way for the purpose of ingress and egress. On account of this, the plaintiffs' found it very difficult to enter into their fields because originally the passage i.e., the road was passing through eastern side of land bearing Block No.275, whose possession is with defendants. As this was the only way to enter into fields of the plaintiffs through the land of the defendants which the defendants bought over from Nathubhai, the plaintiffs

requested the defendants to permit them to use the way which was being used since the time of late Naranbhai Bhulabhai Patel but the defendants did not accede to the request of the plaintiffs and were not ready and willing to recognize the right of the plaintiffs to pass through the road in question for the purpose of entering into their own fields. In para 7 of the plaint Ex.1, the plaintiffs have described the agricultural lands which have the nexus and bearing with the subject matter of the suit. The plaintiffs have based their claim of easementary right of way under Section 13 of the Easement Act, 1882 ('the Act' for short) i.e., by way of necessity and also under Section 15 of the Act i.e., by way of immemorial user and prescription. According to the plaintiff, the defendants were trying to obstruct user of the said way and therefore the suit was filed for the relief of a decree that the plaintiffs can enter into their land as described in para 2 of the plaint from the land described in paras 2 and 3 of the plaint and also the plaintiffs can take their labourers, persons, cultivating apparatus like bullock carts, cattle, tractor, trailer, plough, cultivator, etc., and to continue their use of the land described in para 7 of the plaint as per the provisions of easement right, which they are in the use from the time of their forefathers and from many years and also prayed to restrain the defendants from preventing them from using the aforesaid right.

4. On behalf of defendant Nos.2 and 3, the written statement was filed at Ex.22. (It is expedient to note that defendant No.3 in the suit has been joined as respondent No.3 in this Second Appeal alongwith the plaintiffs). Defendant No.1 filed his written statement at Ex.45. All the defendants had disputed and denied the alleged right of the easement of right of way.

5. On the basis of the rival pleadings, the learned trial Judge raised issues at Ex.69.

6. At the instance of the plaintiffs, a Commissioner was appointed by the learned trial Judge who submitted his report alongwith panchnama and map which are produced respectively at Ex.89 and 90. Plaintiff No.1 himself was examined at Ex.77. One Ranchhodbhai Jivanji Patel was examined at Ex.97 on behalf of the plaintiffs. On behalf of defendants, defendant No.2 was examined at Ex.108. One Nathubhai Odhavji Patel was examined on behalf of the defendants at Ex.119.

7. On appreciation, valuation and critical analysis of the evidence on record, the learned trial Judge dismissed the suit filed by the plaintiffs holding that the plaintiffs have failed to establish their right of way as there was alternative way available to them and, therefore, not entitled to claim easement of necessity and easement by prescription under Sections 13 and 15 of the Act.

8. Aggrieved by the judgment and decree of the learned trial Judge, the plaintiffs filed appeal before the District Court, Navsari. The learned Joint District Judge and 2nd Fast Track Judge, Navsari on re-appreciation, re-evaluation and re-analysis of the evidence, came to the conclusion that it is true that the alternative way is available. However, the plaintiffs have established right of way by way of necessity under Section 13 of the Act as well as easement by prescription under Section 15 of the Act and, therefore, he has passed the decree as prayed for in the plaint by the plaintiff which has given rise to this Second Appeal at the instance of original defendant Nos.1 and 2.

9. Mr. Suresh M. Shah, learned advocate of the defendants, has contended that the findings recorded by the learned Joint District Judge is inconsistent. Mr. Shah has further contended that though the learned first appellate Judge has concurred with the finding of fact recorded by the trial court with regard to availability of alternative way, notwithstanding that fact, decree in favour of the plaintiffs is passed by declaring that the plaintiffs have right of way by way of necessity. Therefore, this inconsistent finding itself is a substantial question of law.

The second contention raised by Mr. Shah is that in view of the provisions of Order 41 Rule 31 of the Code, the appellate Court ought to have framed specific points for determination arising in the appeal which is a mandatory requirement but the learned first appellate Judge has not raised the points for consideration. According to him, provisions of Para 414 of the Civil Manual also stipulate that the appellate Court should frame points for determination in appeal as framed in the trial Court but in instant case the first appellate Judge has not framed such issues and this also being substantial question of law, the appeal requires admission. He, therefore, urged that the appeal may be admitted.

In support of the aforesaid submissions, Mr.

Shah has relied upon the judgment of this Court in the case of Dumala Vaghpara Gram Panchayat v. Chunilal Tribhovandas Patel and others, 2000 (1) GCD 48 (Guj.).

10. Mr. JB Pardiwala, learned advocate of the plaintiffs, has contended that there is no inconsistency in the findings recorded by the first appellate court. The First appellate Court has in terms held in para 24 of the judgment that the plaintiffs have established right of way by easement. It is true that an alternative way is available but that by itself is no ground to refuse the right of way available to the plaintiffs by way of necessity. It is also asserted by him that it is true that the learned first appellate Judge should have framed points for determination and in this case the learned appellate Judge has in fact formulated points for determination in the body of the judgment. The learned appellate Judge has dealt with and discussed in detail with regard to the findings record by the learned trial Judge. Therefore, according to Mr. Pardiwala, it is not necessary for the appellate Judge to formulate all points for determination as framed by the trial court in the suit.

In support of the aforesaid contention, he has relied upon the judgment of this Court in the case of Navinchandra Nathalal Doshi v. Jagdishbhai Shankerlal Modi and others, 2004 (2) GLR 1714.

He, therefore, contended that there is no substantial question of law raised by the defendants in this appeal and urged the judgment and decree passed by the learned first appellate Judge deserves to be affirmed by dismissing the appeal. He, therefore, urged to dismiss the appeal.

11. This Court has considered the submissions advanced by the learned advocates appearing for the parties and has perused the judgments rendered by the learned trial Judge so also by the first appellate Judge and the set of evidence supplied by the learned advocates appearing for the parties during the course of their submissions as well as R & P which were called for by his Court.

12. There is no manner of doubt that the land mentioned in para 1 of the plaint Block No.275 and 423 were once upon a time consolidated holding of land. Thereafter there was partition between members of the family. Some portion of the said land came to the share of the plaintiffs and some portion came to the share of

Nathubhai Odhavji who sold the land to the defendants. The learned trial Judge has on the basis of the evidence recorded the finding that the plaintiffs have alternative right of way from other land and therefore they cannot claim right of way by way of necessity. The appellate court in para 24 of the judgment has observed as under:

> "Now, as discussed above, the fact has become clear that there was one survey number of original suit property and when the said survey was divided into block, the plaintiffs and the defendants have obtained the said properties. In this connection, if tracing Exh.127 and panchnama of the Court Commissioner are perused, it becomes clear that if the plaintiffs want to enter the block which is under their possession there is no other way except the disputed way. The said fact becomes evidently clear from the map of the place drawn by the Court Commissioner. Thus, if it is considered a different way, then also whereas one number is divided into several parts, a part thereof may be for passing by from the land of the portion for other because originally the property was as a whole and its partitions are made which has been established from the record. In these circumstances, it becomes clear by referring the panchnama and tracing drawn by the Court Commissioner that there is no other way for entering the block of the plaintiffs except the disputed road mentioned by the plaintiffs in their plaint. The plaintiffs have stated in their evidence that the said disputed road was being used prior to the partition of the property meaning thereby the said disputed road is being used from the period of ancestors. In view of this, the plaintiffs are entitled to use the disputed road by virtue of long time use (enjoyment). Not only this but Nathubhai Odhavbhai Ex.119, examined by the defendants, has admitted in his evidence that there is a straight way in the agriculture land, as mentioned in the suit, for going to Hanuman Falia through the village outskirts by Halpativas and the entire work for agricultural land is being done through the said road from the period of the ancestors. His father and uncle have been carrying out agriculture work by this road. Thus, according to these witnesses, who are specifically stated to be the witnesses of the defendants, the parties have been using the said disputed road for years together prior to the partition of the

property."

13. It may be appreciated that Nathubhai Odhavji who has been examined at Ex.119 by the defendants has admitted that the plaintiffs were using the right of way from the very land since the time of his forefathers and they were doing agricultural operations by taking their equipments, etc., from the same road. He has also stated that his father and uncle were also using the same road for going to their field for the purpose of carrying out the agricultural operations.

14. It may be appreciated that the suit of the plaintiffs was dismissed by the trial Court on the ground that there is an alternative way available to them and if there is an alternative way then they cannot take recourse of Section 13 (e) of the Indian Easement Act i.e., easement of necessity. The defence of alternative way was pleaded by the defendants, therefore, the burden is on the defendants to prove that there is an alternative way for the plaintiffs to enter into their fields. It is relevant to note that in order to prove the existence of the alternative way, one should prove that (a) the alternative way should be convenient, (b) the alternative way should be reasonable and usable in the background of the easement of right of way and the parties thereto and (c) the alternative way should be such whereby the person had acquired the legal or the lawful right of its user without any obstruction being offered or raised by the owner of the servient tenement. Perusal of the evidence of defendant No.2 in the suit would go to show that the defendants have no idea or any knowledge of any alternative way available to the plaintiffs to enter into their fields bearing Block Nos.423 and 275. Defendant No.2 in his cross-examination has stated that he has no knowledge as to whether the plaintiffs and their ancestors used to pass through the road in question for the purpose of agricultural operations. In short, the defendants have pleaded complete ignorance about the alternative way. Nathubhai Odhavji who was examined by the defendants as their witness in terms has admitted that the plaintiffs had been using the suit way. Further, the said witness has admitted the partition inter-se his ancestor and the ancestors of the plaintiffs who had formed the Hindu Undivided Joint Family which later on came to be dissolved. Further Nathubhai Odhavji has admitted the existence and the user of the suit way by the plaintiffs and their ancestors in fact and in reality. The lower appellate court has rightly considered the unqualified and specific admission by Nathubhai Odhavji Ex.119 in

disbelieving the case of the defendants so far as alternative way is concerned. On one hand the suit preferred by the plaintiffs was dismissed on the ground that there is an alternative way available to the plaintiffs whereas the evidence on record clearly goes to show that the defendants have no knowledge or any information of any alternative way available to the plaintiffs. The defendants have gone to the extent of deposing that they have no idea about the road which is being used by the plaintiffs for the purpose of entering into their fields as on today. Moreover, the admissions of defendant No.2 and the witness examined by the defendants, Nathubhai Odhavji were completely overlooked by the trial Court.

The fact that the plaintiffs are being permitted to enter into their fields through the land of one Ishwarbhai Madhavbhai would not be sufficient to deny the claim of right of way by easement of necessity as prayed for by the plaintiffs. Ishwarbhai Madhavbhai may be permitting the plaintiffs to pass through his agricultural field and that would be a good approach for the plaintiffs if nobody were to obstruct but that cannot be regarded really as an alternative way available to the plaintiffs. The plaintiffs have no lawful right to use that way, but they can do so with the permission of or in the absence of any protest by Ishwarbhai Madhavbhai. The plaintiffs cannot be said to be enjoying an alternative way unless they had the lawful right to use that way.

Plaintiff (Ex.77) had specifically denied in his cross-examination the suggestion or the allegation as to the existence of the alternative way and user thereof by the plaintiffs as alleged by the defendants.

15. In aforesaid view of the matter, this Court is of the considered opinion that there is no inconsistent finding recorded by the learned first appellate Judge with regard to the right of way by way of necessity and prescription in favour of the plaintiffs. It is also settled principle of law that the first appellate Court is the last fact finding authority and the finding of fact recorded by the first appellate Court cannot be disturbed by this Court in an appeal which is filed under Section 100 of the Code unless it is shown that the said finding is perverse, capricious or arbitrary. From the record, it does not appear that the finding recorded by the learned first appellate Judge is perverse, capricious or arbitrary and it also cannot be said that the finding recorded by the first appellate Judge that the right of way by way of necessity is inconsistent with the evidence

recorded before the trial court.

16. What is substantial question of law for the exercise of jurisdiction under Section 100 of the Code has been very succinctly explained by the Supreme Court in the case of Santosh Hazari v. Purushottam Tiwari (Dead) by Lrs. AIR 2001 SC 965. The relevant paras of the above referred judgment as as under:

"12. The phrase 'substantial question of law', as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying 'question of law', means - of having substance, essential, real, of found worth, important or considerable. It is to be understood as something in contradistinction with -- technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of 'substantial question of law' by sufficient the words 'of general importance' as has been done in many other provisions such as Section 109 of the Code or Article 133 (1) (a) of the Constitution. The substantial question of law on which a Second Appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T.Ram Ditta, AIR 1928 PC 172, the phrase 'substantial question of law' as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties....."

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned....."

15. "..... While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the

> findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, moreso when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact..... We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in Second Appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in Second Appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

17. Another point which is canvassed by Mr. Shah, learned advocate of defendants, is that under Order 41, Rule 31 of the Code, the appellate Court must have framed points for determination. According to this Court, the said contention is also without substance. In the case of Dumala Vighpara Gram Panchayat (supra), this Court has held that serious issues tried by trial Court were required to be enquired into and scrutinised by appellate Court. In that case, instead the appellate court merely considering that there was an earlier suit in which the permission for construction was granted decided the appeal in favour of the plaintiff. Therefore, the case was remitted to the trial court. The said judgment is of no assistance to the case of the defendants. Further more, the said judgment does not lay down an absolute proposition of law that non-framing of points for determination in appeal by the first appellate Court vitiates the well-reasoned judgment delivered by the first appellate Judge and hence the same cannot be considered as a substantial question of law.

18. In the case of Navinchandra Nathalal Doshi (supra) this Court has held that all the courts, including the appellate Bench of the Small Causes Court, are required to frame appropriate points for determination at the time of deciding such appeal. When the appellate court is deciding an appeal under the Bombay Rent Act, it is necessary to comply with the provisions of Order 41, Rule 31 of the Code, which also require that the points for determination are framed by the Court. The appellate Court, therefore, should take appropriate care in all such cases to frame appropriate points for determination. In fact, it is the duty of the appellate Court to see that such points for determination are framed. In the said decision this Court has also held that simply because the appellate Bench has not framed the points for determination, that itself cannot vitiate the judgment of the appellate Bench on the aforesaid point. This judgment is squarely applicable to the facts of the instant case and is the complete answer to the contentions raised by Mr. Suresh M. Shah, learned advocate of the defendants. It is true that in this judgment it has been held that it is the duty of the appellate Court to see that points for determination are framed. However, the said judgment has also laid down the proposition that non-framing of points for determination, that itself cannot vitiate the judgment of the appellate Court.

19. One more contention advanced by Mr. Shah, learned advocate of the defendants, is that Rule 414 of the Civil Manual also stipulates that the appellate Court should frame points for determination in appeal as framed in the trial Court but in instant case since the appellate Court has not framed points for determination and since there is a breach of the provisions of Rule 414 of the Civil Manual committed by the first appellate Judge, this matter requires consideration and this being a substantial question of law, the appeal requires to be admitted. This Court finds no substance and merit in the aforesaid contention raised by Mr. Shah. According to this Court, Rule 414 of the Civil Manual is based on Order 41 Rule 31 of the Code and since this Court has held that non-framing of points for determination that itself cannot vitiate the well-reasoned judgment of the appellate Court, the aforesaid contention is also required to be rejected and accordingly it is also rejected.

20. In the instant case, the first appellate Judge has considered all the aspects of the matter and

submissions made by the learned advocates for the parties in the body of the judgment. Therefore, according to this court, though the learned first appellate Judge has framed only one point for determination as to whether the judgment and decree which was impugned before him is against the settled principles of law and in absence of framing other points, it cannot be said that the learned first appellate Judge has committed an error. On perusal of the body of the judgment, the learned first appellate Judge has answered all the questions raised by the learned advocates appearing for the parties. The learned first appellate Judge has also discussed the relevant provisions of the Easement Act as well as evidence adduced before the trial court and on the basis of the same the appellate court has reached to the finding that the plaintiffs have established their right of way by necessity.

21. This Court is in complete agreement with the findings recorded and ultimate conclusion reached by the learned first appellate Judge. According to this Court, on the basis of the evidence on record, no other conclusion could be arrived at except the one recorded by the learned appellate Judge and this Court is the view that the conclusions arrived at by the learned first appellate Judge is just and legal.

22. In aforesaid view of the matter, this Court is of the view that no question of law much less substantial question of law is surfaced during the course of submissions made by Mr. Shah, learned advocate of the defendants requiring interference of this Court with the impugned judgment and decree in exercise of powers under Section 100 of the Code. Therefore the appeal lacks merit and deserves to be dismissed.

23. For the foregoing reasons, the appeal fails and accordingly it is dismissed. Notice is discharged. No order to costs.

24. As the Second Appeal is dismissed, the civil application which is field for stay of the impugned judgment and decree of the first appellate Judge deserves to be rejected and accordingly it is also rejected. Ad-interim relief which has been granted earlier stands vacated. Notice is discharged. No order to costs.

25. At this stage, Mr. Shah, learned advocate of the defendants, urged that the interim relief granted by the the lower Court which has remained operative till today may be extended for a further period of three months to

enable the defendants to take further legal recourse. Mr. Pardiwala, learned advocate of the plaintiffs, has stated that when this Court has dismissed the appeal on merits, no such extension can be granted.

26. This Court has considered and discussed all the aspects of the matter and came the conclusion that the finding recorded by the first appellate Judge which is the last fact finding authority is just and proper. This Court has also observed that no substantial question of law could be raised during the course of submissions made on behalf of the defendants. Therefore, the prayer made by Mr. Shah cannot be accepted and hence the same is rejected.

(A.M. Kapadia, J.)

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